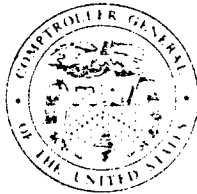


**DECISION**

**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

61364

98661

FILE: B-184678

DATE: AUG 18 1976

MATTER OF: Specialist Raymond C. Maltos, USA,  
Retired (deceased)

**DIGEST:**

1. Member elected Survivor Benefit Plan (SBP) annuity for children only indicating on election certificate that he was divorced, when in fact he was not divorced. Since, notwithstanding departmental regulations to the contrary, member who has a spouse may not legally elect SBP annuity for children and exclude spouse (R-177471, January 19, 1973), such election in this case will be considered an election of annuity for wife and then children, since clearly member intended to participate in SBP.
2. Where member indicated on Survivor Benefit Plan (SBP) election certificate that he was divorced (when in fact he was not), obligation was placed on counseling officer to determine from member's service records whether there was evidence to cast doubt on that representation. Since that was not done and such evidence was available, SBP annuity payments to children were erroneous and Government did not receive good acquittance. Annuity should now be established in favor of wife but no recovery of erroneous payments to children need be made nor duplicate payment made to wife since children's payments were made to wife as custodian for children for whose support she was responsible anyway.

This action is in response to a letter dated June 20, 1975 (FINCM-T), from Lieutenant Colonel R. J. Withington, USA, Finance and Accounting Officer, United States Army Finance Support Agency, requesting an advance decision regarding payment of benefits under the Survivor Benefit Plan (SBP) established by the act of September 21, 1972, Public Law 92-425, 86 Stat. 706, 10 U.S.C. 1447-1455 (Supp. II, 1972), in the case of Specialist Sixth Class Raymond C. Maltos, USA, 466-42-1193 retired (deceased). The request was assigned Control No. DO-A-1240 by the Department of Defense Military Pay and Allowance Committee.

According to the submission, Specialist Maltos elected to provide an annuity for his 3 children only on June 14, 1973, and his Survivor Benefit Plan - Election Certificate (DD Form 1883) showed him to be divorced. We understand from the record that Specialist Maltos was, in fact, legally married to Dorothea Maltos at that time and never obtained a divorce thereafter, although there is some indication he had begun divorce proceedings prior to his death. Specialist Maltos retired on June 23, 1973, and died as the result of an accident on October 16, 1974. The SBP annuity was established in equal shares to the three dependent children, aged 18, 15 and 14. The annuity checks were drawn payable to Mrs. Dorothea Maltos as custodian for the children. However, Mrs. Maltos has made claim for the annuity in her own right based upon the fact that she and Specialist Maltos were never divorced. We note that the submission includes a copy of the member's designation of beneficiary of unpaid retired pay (DD Form 3140) dated June 20, 1973, in which the member designates Dorothea M. Maltos as such sole beneficiary and indicates that she is his spouse.

The submission states that Dorothea Maltos was never notified of Specialist Maltos' election not to provide an SBP annuity for his spouse nor was she counseled as to elections available and the effects of such elections. It is indicated that this was due to the fact that the election certificate indicated that the member was divorced. The submission also states that Specialist Maltos could have elected to provide coverage for his children only, in lieu of his spouse, without misrepresenting his marital status. Therefore, a counselor may have determined that further investigation of Specialist Maltos' marital status was unnecessary.

The submission indicates that the member's SBP election certificate was received in the Army Finance Center on June 19, 1973, under separate cover, and was not timely associated with the file when the member's retired pay account was established. Therefore, the election was temporarily established for a spouse and a request for birthdates was made so that the cost for children could be computed. When birthdates were furnished the election was erroneously changed to coverage for spouse and children without regard to information on the election certificate. Apparently, the request for birthdates prompted Mrs. Maltos in July 1973 (prior to the member's death) to

advise the Army of her belief that she too was covered under the SBP. However, the SBP election was changed in accordance with the election certificate to provide coverage for children only. The excess premium was refunded to Mrs. Maltos with the arrears of pay upon the member's death and the SBP annuity was established in equal shares to the three children.

The Finance and Accounting Officer asks how far the administrative responsibility to notify the member's spouse of an election not to participate in the SBP extends. He indicates that in cases such as this, it seems that a false statement by the member regarding the existence of a wife would amount to his indicating a desire not to provide coverage for her. He encloses a voucher in favor of Mrs. Maltos in the amount of \$1,644.50 for SBP annuity payments for the period of October 17, 1974, to May 31, 1975, and asks whether payment on such voucher may be made or whether the member's misrepresentation of his marital status relieves the Government of an obligation to make such payments. He also asks, if it is determined that Mrs. Maltos is entitled to the annuity, should the payments made to Mrs. Maltos as custodian for the children be considered erroneous payments which must be recouped.

Regarding the applicability of the SBP, 10 U.S.C. 1448(a) provides in pertinent part:

"(a) The Plan applies to a person who is married or has a dependent child when he becomes entitled to retired or retainer pay unless he elects not to participate in the Plan before the first day for which he is eligible for that pay. If a person who is married elects not to participate in the Plan at the maximum level, that person's spouse shall be notified of the decision. An election not to participate in the Plan is irrevocable if not revoked before the date on which the person first becomes entitled to retired or retainer pay. \* \* \*

Accordingly, section 1448(a) allows the member to elect not to participate in the SBP, but it requires that the member's spouse be notified if the member elects not to participate at the maximum level. In addition, 10 U.S.C. 1455 provides that

regulations shall be prescribed to insure that the member and his spouse are informed of the elections available and the effects of such elections in conjunction with the notification required to be given the spouse under section 1443(a) if the member elects not to participate in the SBP at the maximum level.

As was indicated previously, the Finance and Accounting Officer states that Specialist Maltos could have elected coverage for his dependent children only, without making a false statement as to his marital status, and therefore, a counselor may have determined that further investigation of marital status was not warranted. Apparently the Finance and Accounting Officer made this statement in reliance upon regulatory provisions found in section 201a of Department of Defense Directive No. 1332.27 (January 4, 1974), which provides in pertinent part:

"a. \* \* \* A member who has both a spouse and dependent children on the date of retirement has four election options if he does not desire to participate in the Plan, covering both spouse and children at the maximum level. He may cover his spouse and children at less than the maximum level; he may cover the spouse and not the children at the maximum level or less; he may cover the children and not the spouse at the maximum level or less; or he may elect not to participate in the Plan. \* \* \*"  
(Emphasis added.)

The above-quoted regulation sanctions an election to cover the member's dependent children only, in lieu of his spouse. However, in our decision B-177471, dated January 19, 1973, it was held that under the plain terms of the law, if a member has a spouse, he may not elect an annuity for his children only. It was indicated that we were unable to agree that an eligible widow becomes an ineligible widow solely by the member electing her out of the SBP and that the regulations which would authorize such an election must be considered as contrary to the law. It is noted that we did not require the department to change the regulation in question pending action by the Congress making an appropriate change in the controlling provision of the law. However, as of this date, no action has been taken by Congress which would permit the designation of dependent children, in lieu of a spouse, as beneficiaries under the SBP. Thus, Specialist Raymond C. Maltos' statement

that he was divorced cannot legally be treated as an election to provide an annuity for his children, in lieu of his spouse, since such an election is contrary to the law.

It is clear that Specialist Maltos did intend to participate in the SEP since he did complete an election certificate and deductions were made from his retired pay account. Further, under 10 U.S.C. 1448(a) SEP coverage is effective unless the member makes a positive election not to participate. We do not view the member's election in which he misrepresented his marital status as an effective election not to participate in the SEP. Therefore, since he could not legally elect an annuity in favor of his children only while he had a wife, it appears that in this case the election should be treated as an election for wife and then children.

Concerning whether the member's misrepresentation of his marital status relieved the Government of its obligation to pay an annuity to his wife, the SEP was the culmination of a long recognized need for the protection of military widows and dependent children. Therefore, spouses are to be brought in at the decision making level so that all of the consequences of nonparticipation may be explained, and it is the implied responsibility of counseling officers to determine whether there is an eligible spouse or dependent child. In cases where a member states in his election certificate that he does not have a spouse or child eligible for an SEP annuity, the service records of that member should be administratively examined to determine the accuracy of his representations. If, after such an examination, there is no evidence of record which would tend to cast doubt on the truthfulness of those representations, such an election may be accepted and the Government would gain a good acquittance in the matter should it be posthumously discovered that the member did in fact have an eligible spouse or child. See 53 Comp. Gen. 192 (1973).

In the present case, upon the filing of the election certificate containing the statement by Specialist Maltos that he was divorced, an obligation was placed upon the counseling officer to determine from the member's service records whether there was any evidence to cast doubt upon that representation. Apparently that was not done. It also appears that some

question as to the member's marital status would have been apparent at the Finance Center since the SEP election certificate containing the misrepresentation as to marital status dated June 14, 1973, was received there June 19, 1973, and the designation of beneficiary form (DA Form 3140) showing Dorothea Maltos as the member's spouse, was dated one day later, June 20, 1973. In addition Mrs. Maltos' inquiry in July 1973 presumably should have raised some question as to her marital status. Therefore, it appears that had the member's service records been checked by the counseling officer or the Finance Center substantial doubt as to the member's true marital status would have been raised. Thus, it does not appear that the Government can be said to have received a good acquittance based on the member's misrepresentation in this case. Compare 37 Comp. Gen. 131, 133 (1957).

In most cases similar to this we would authorize payment to the proper party without waiting for recovery of the erroneous payment. 37 Comp. Gen. 131, 133, supra. However, in this case the erroneous payment was made to Mrs. Maltos as custodian for the children, for whose care and support she was apparently legally responsible. Therefore, in this case there is no reason to make what would amount to a duplicate payment to her for the period for which she has received the annuity on behalf of her children, nor is there reason to recover the erroneous payments made to her as custodian for her children. Accordingly, payment is not authorized on the voucher submitted and it will be retained in this Office.

However, the SEP annuity should now be established, as indicated above, on the basis of an election for spouse and then children and payment of such annuity made to Mrs. Maltos in her own right as long as she remains eligible, and then to the children provided they are eligible. The extra cost of such annuity which was refunded to Mrs. Maltos with the member's unpaid retired pay must be collected from her or deducted from current annuity payments. See 54 Comp. Gen. 493, 497 (1974), and cases cited therein.

The questions are answered accordingly.

R.F.KELLER

Deputy            Comptroller General  
                 of the United States